minimal short-fall should be disregarded. Counsel for the DSS said that s.83AD(1) drew a line and that, no matter how narrow the margin, the 12 month period had not been completed.

The measurement of 12 months

The Tribunal referred to a series of judicial decisions which established 'that the law recognises no fraction of a day': see, in particular *Prowse* v *McIntyre* (1961) 111 CLR 264 where the High Court decided that a six-year limitation period, which ran from 27 November 1951, finished on 26 November 1957.

There was, the Tribunal said, also a general rule that the day from which a period runs is excluded from the measurement of that period: see, for example, *Forster* v *Jododex Australia Pty Ltd* (1972) 127 CLR 421. However that general rule did not apply to s.83AD(1) which referred to 'the period of 12 months that *commenced on* the date of his return to, or arrival in, Australia'. Accordingly in deciding whether Pennisi had stayed in Australia for 12 months, the date of his arrival (28 February 1982) was to be included.

The Tribunal concluded:

> 17. Applying to the present case the two principles considered above, we find that by leaving Australia on 27 February, 1983, Mr Pennisi left on the last day of the period of 12 months commencing on 28 February, 1982; as each of those days is to be included in the period as a complete day, that period was completed at the commencement of 27 February, 1982 and, accordingly, he did not leave Australia before the expiration of the 12 month period commencing on the date of his return. Therefore, the respondent is not entitled to suspend payment of his pension by virtue of sub-section 83AD(1). Accordingly, the decision under review will be set aside and the matter remitted to the Director-General of Social Security with the direction that payment of the applicant's pension be resumed as from the first pension payday after 10 March, 1983.

[The Tribunal referred to another argument raised by counsel for Pennisi. This argument was that s.83AD(1) allowed the 12 month period to be measured either from the person's 'arrival in' Australia or from the person's 'return to' Australia; and that a person's 'return to' Australia commenced when that person began her or his journey to Australia – in this case, when Pennisi left Rome airport on 26 Feburary 1982. The Tribunal said it was not necessary to decide that point.]

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General with a direction that payment of the applicant's pension be resumed from the date of suspension.

Special benefit: 'unable to earn'?

MACRAE and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. N82/347)

Decided: 22 March 1984 by C.E. Backhouse.

Kenneth MacRae, a self-employed inventor, applied to the DSS for special benefit to support him while developing an invention. When this claim was rejected, MacRae asked the AAT to review the decision.

Section 124(1) of the *Social Security Act* gives the Director-General a discretion to grant special benefit to a person if

> the Director-General is satisfied that, by reason of age, physical or mental disability or domestic circumstances, or for any other reason, that person is unable to earn a sufficient livelihood for himself and his dependents (if any).

'Unable to earn'?

MacRae told the Tribunal that he was a qualified civil engineer, but had been working full-time on the development of his invention and several business ventures for some years. He had accumulated substantial debts, as none of his activities was yet producing income.

The Tribunal said that the discretion to grant a special benefit only arose where a person was 'unable to earn a sufficient livelihood' for one of the reasons listed in s.124(1). Where a person could exercise some control over the circumstances which prevented him earning a sufficient livelihood, that person could not be described as unable, for any other reason, to earn a sufficient livelihood.

In this case, MacRae was in control of the circumstances which stopped him earning a livelihood and there was, therefore, no basis for the exercise of the discretion.

Moreover, even if MacRae had been unable to earn a sufficient livelihood, this was not a proper case for exercising the discretion in his favour: the purpose and scope of s.124 did not cover the provision of a continuing financial subsidy to a business venture.

Formal decision

The AAT affirmed the decision under review.

Family allowance: child's residence

EVANS and DIRECTOR-GENERAL OF SOCIAL SECURITY
(No. S83/93)

Decided: 11 May 1984 by R.C. Jennings, E. Smith and J. Linn.

Kim Evans was a permanent resident of Australia. In January 1983, her 21-year-old brother came to Australia on a one year student's visa to undertake a matriculation course, with a view to gaining entry to a tertiary course.

Shortly after her brother's arrival, Evans applied for a family allowance in respect of her brother. When that application was rejected by the DSS, she asked the AAT to review the rejection.

The legislation

Section 96(1) of the *Social Security Act* provides that a family allowance shall not be granted unless

> ...
> (b) the child in respect of whom the family allowance is claimed –
> (i) is living in Australia, whether or not he is temporarily absent from Australia; and
> (ii) if not born in Australia, has, during the period of 12 months immediately preceding the date on which the claim was lodged, been resident in Australia.

According to s.96(2) of the Act, s.96(1)(b)(ii) shall not apply where –

> (a) the Director-General is satisfied that the claimant and the child are likely to remain permanently in Australia.

'Resident . . . during the period of 12 months'

The AAT said that s.96(1)(b)(ii) meant that a child born outside Australia had to reside in Australia for the full period of 12 months immediately before the claim was lodged. It was not sufficient, as Evans' advocate had argued, that the child had resided in Australia for some part of that 12 month period. This reading of s.96(1)(b)(ii) was supported by the provision's history and by the presence of s.96(2)(a):

> [I]f the applicant's interpretation was correct, there would be no need for s.96(2)(a), at least so far as sub-paragraph (b)(ii) of sub-section (1) is concerned.
> 13. The fact that the Director-General is required to consider whether a child is likely to remain permanently in Australia is a clear guide to an intention not to render every child living in Australia, for however short a time, a person in respect of whom family allowance shall be immediately granted. There is clearly an intent to impose a residential qualification *in addition to* the first requirement that the child shall be *living* in Australia.

On the facts of this case, therefore, Evan's brother did not meet the requirements of s.96(1)(b)(ii).

'Likely to remain permanently in Australia'

The AAT then turned to the question raised by s.96(2)(a). Was the Tribunal satisfied that, when the claim was lodged, Evans' brother was 'likely to remain permanently in Australia'?

Adopting decisions on the meaning of

'permanent incapacity' (such as *McDonald* (1984) 18 *SSR* 188 and *Panke* (1981) 2 *SSR* 9), the Tribunal asked whether it was more likely than not that Evan's brother would, at the time of the claim, remain here indefinitely.

The AAT said that it had to decide this question in the light of the material before it (not the material before the DSS) and 'make its own decision in place of the administrator's': Reasons, para. 18.

However, the AAT said, it could not 'use subsequent events to construe the situation existing at the time the decision has to be made – in this case at, or soon after, the time when the person concerned first arrived in Australia': Reasons, para. 19.

At that time, Evans' brother was enrolled in a matriculation course. There was no 'convincing evidence of "ability to matriculate" [nor] as to his prospects of acceptance for tertiary studies' and, therefore, no basis on which it could be said that he was likely to stay in Australia indefinitely.

The fact that, in 1984, Evans' brother enrolled in a four year degree course at a tertiary institution was not relevant, the AAT said, to the question which had to be answered in the light of information available in early 1983.

Even if account was taken of his enrolment in the degree course, the AAT said, Evans' brother would not be a person 'likely to remain permanently [i.e. indefinitely] in Australia' because he was:

> in Australia for a definite time, that is to say a time 'which is predictable and capable of being quantified', though not necessarily with precision, to use Woodward J's words [in *McDonald*]. The definite time was the period of his course and at that stage he would not, on present indications, be eligible for permanent status.

(Reasons, para. 26.)

Formal decision

The AAT affirmed the decision under review.

Sickness benefit: graduate student

NELSON and DIRECTOR-GENERAL OF SOCIAL SECURITY (No. V83/315)

Decided: 2 April 1984 by J.O. Ballard, R.G. Downes and L.J. Cohn.

Anitra Nelson had been enrolled as a graduate student at La Trobe University, where she was researching the Mexican foreign debt for a master's degree. She held a Commonwealth Postgraduate Research Award which provided a living allowance of $4620 a year and several other allowances.

In February 1983, Nelson suspended her studies on medical advice: she was diagnosed as suffering from severe 'reactions to many foods and several common chemical exposures'. (Her studies and payment of the Award remained suspended at the time of the AAT's decision.)

Nelson applied for sickness benefit but the DSS rejected this claim, in accordance with a departmental instruction:

> 22.A student who intends to resume his studies as soon as he recovers from his incapacity does not qualify for Sickness Benefit under the new provision. In other words, the student must have abandoned his course for the year and intend to obtain employment when he is well enough. Evidence such as a copy of agreement by the Institution to withdraw from the course should be obtained.

Nelson applied to the AAT for review of this decision.

The legislation

Section 108(1) provides that a person is qualified for sickness benefit if he or she passes age and residence requirements and if

> (c) the person –
> (i) satisfies the Director-General that throughout the relevant period, he was incapacitated for work by reason of sickness or accident (being an incapacity of a temporary nature) and that he has thereby suffered a loss of salary, wages or other income; or
>
> (ii) not being a person who is qualified to receive sickness benefit by virtue of the operation of sub-section (1AA), satisfies the Director-General that, throughout the relevant period, he was incapacitated for work by reason of sickness or accident (being an incapacity of a temporary nature) and that he would, but for the incapacity, be qualified to receive an unemployment benefit in respect of the relevant period."

Can research be 'work'?

The Tribunal referred to the decision in *Wood* (1984) 18 *SSR* 1985, where the AAT had decided that a former student who had lost a NEAT allowance had not 'suffered a loss of . . . income' within s.108(1)(c)(i). This was because 'income' referred to money paid in return for services performed or work done.

But, the Tribunal said, the present case was different: Nelson was not engaged in a structured course to obtain a qualification but was undertaking research which might lead to a higher degree. That research could be regarded as work and the Award payments as income: this depended on an assessment of the nature of the research; it did not depend 'on the broad brush approach relating to "students" contained in the departmental policy instruction; which is without legal authority': Reasons, para. 14.

On the Tribunal's assessment, '[Nelson's] research project could not properly be described as work for the purposes of section 108 of the Act'; she had not, therefore, become incapacitated for work; and she was not, the Tribunal said, qualified for sickness benefit: Reasons, para. 12.

Special benefit

However, the AAT said, that did not conclude Nelson's entitlement. The Director-General or his delegate should have considered whether or not to pay her a special benefit under s.124 of the Act.

That section gives the Director-General a discretion to pay a special benefit to a person when the Director-General is satisfied that, 'by reason of . . . physical . . . disability . . . that person is unable to earn a sufficient livelihood'. Nelson's right to be considered for special benefit under section 124 was, the AAT said, 'unquestionable'. The failure to consider her eligibility for special benefit should now be rectified: Reasons, para. 15.

Formal decision

The AAT set aside the decision under review and remitted the matter to the Director-General for reconsideration in accordance with its Reasons.

[**Comment**: The Tribunal's review of Nelson's claim for sickness benefit is rather frustrating. It is difficult to see why a person's 'incapacity for work' should be assessed solely by looking at that person's activities *before* she became incapacitated. That is certainly not the approach taken by the Tribunal or the Federal Court in the context of invalid pension decisions.

Even if Nelson could not meet the requirements of s.108(1)(c)(i) – because, for example, the Award which she had lost, was not 'income' – she might have qualified under s.108(1)(c)(ii). But the Tribunal said nothing on that issue (although the DSS had expressly based its rejection of her claim on both sub-paragraphs (i) and (ii) of s.108(1)(c)).

It might be objected that, if the DSS reacted to the AAT's suggestion that Nelson be granted a special benefit, then any inadequacy in the Tribunal's review of the sickness benefit question would be of academic interest only. There are two responses to that: first, that special benefit is of less value than sickness benefit; and, second, claimants are entitled to insist that their welfare rights be treated seriously and thoroughly. **PH**]